

shall not apply, but shall be used as a guide for application of procedures and principles designed to assure production of the most probative evidence available. The Hearing Officer may exclude evidence which is immaterial, irrelevant, or unduly repetitious. The Hearing Officer is specifically prohibited from initiating or otherwise engaging in *ex parte* discussions on a complaint matter at any time during the pendency of the complaint proceeding under this part.

(d) The complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. Once the complainant has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure, participation, or refusal.

(e) Testimony of witnesses shall be given under oath or affirmation, and the witnesses shall be subject to cross-examination. Witnesses shall be advised of the applicability of 18 U.S.C. 1001 and 1621, dealing with the criminal penalties associated with false statements and perjury.

(f) At his or her discretion, the Hearing Officer may arrange for the issuance of subpoenas for witnesses to attend the Hearing on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing of the necessity for such witness or evidence has been made to the satisfaction of the Hearing Officer.

(g) All hearings shall be mechanically or stenographically reported. All evidence upon which the Hearing Officer relies for the recommended decision under § 708.10(b) shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits and other pertinent documents or records, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

(h) Any party, upon request, may be allowed a reasonable time to file with the Hearing Officer a brief or statement of fact or law. A copy of any such brief or statement shall be filed with the Hearing Officer before or during the proceeding and shall be served by the submitting party upon each other party by certified mail. The parties may make oral closing arguments, but post-hearing briefs will only be permitted at the direction of the Hearing Officer. When permitted, any such brief shall be limited to the issue or issues specified by the Hearing Officer and shall be due within the time prescribed by the Hearing Officer.

(i) At the request of any party, the Hearing Officer may, at his or her discretion, extend the time for any hearing held pursuant to this § 708.9. Additionally, the Hearing Officer may, at the request of any party, or on his or her own motion, dismiss a claim, defense, or party and make adverse findings—

(1) Upon the failure without good cause of any party or his or her representative to attend a hearing; or

(2) Upon the failure of any party to comply with a lawful order of the Hearing Officer.

(j) In any case where a dismissal of a claim, defense, or party is sought, the Hearing Officer shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the Hearing Officer shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense, or party. An order dismissing a claim, defense, or party may be appealed to the Director for reconsideration.

#### **§ 708.10 Initial agency decision.**

(a) If a hearing is not requested, the Director, within 30 days of expiration of the time set forth in § 708.9(a) for request of a hearing, shall issue an initial agency decision based upon the record, which decision shall be served upon the parties by certified mail. The initial agency decision shall contain appropriate findings, conclusions, and an order, and shall set forth the factual basis for each and every finding with

respect to each alleged discriminatory act. In making such findings, the Director may rely upon, but shall not be bound by, the findings contained in the Report of Investigation.

(b) If a hearing has been held, the Hearing Officer shall issue an initial agency decision within 30 days after the receipt of the transcript from the proceeding at which evidence was submitted or within 30 days after receipt of any post-hearing briefs permitted under § 708.9(h), whichever is later. The initial agency decision shall contain appropriate findings, conclusions, and an order, and shall set forth the factual basis for each and every finding with respect to each alleged discriminatory act. In making such findings, the Hearing Officer may rely upon, but shall not be bound by, the findings contained in the Report of Investigation. The Hearing Officer shall send the initial agency decision, together with the entire record, to the Director who shall promptly serve the initial agency decision upon all parties to the proceeding by certified mail.

(c) The initial agency decision may include an award of reinstatement, transfer preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued.

(1) If the initial agency decision contains a determination that the complaint is without merit, it shall also include a notice stating that the decision shall become the final decision of DOE denying the complaint unless, within five calendar days of its receipt, a written request is filed with the Director for review by the Secretary or designee. Copies of any request for review shall be served by the requesting party upon all parties by certified mail.

(2) If the initial agency decision contains a determination that a violation of § 708.5 has occurred, it shall also include an appropriate order to the contractor to abate the violation and to provide the complainant with relief, as well as notice to the parties that the decision shall become the final decision of DOE unless, within five calendar

days of its receipt, a written request is filed with the Director for review by the Secretary or designee. Copies of any request for review shall be served by the requesting party upon all parties by certified mail.

(3) Notwithstanding the provisions of paragraph (c)(2) of this section, if the agency decision contains a determination that a violation of § 708.5 has occurred, it may contain an order requiring the contractor to provide the complainant with interim relief, including but not limited to reinstatement, pending the outcome of any request for review. This paragraph shall not be construed to require the payment of any award of back pay or attorney fees before the DOE decision is final.

#### **§ 708.11 Final decision and order.**

(a) Upon receipt of a request for review of an initial agency decision by the Secretary or designee, the Director shall forward the request, along with the entire record, to the Secretary or designee.

(b) Within 60 days after the Director receives a request for Secretarial review of an initial agency decision, the Secretary or designee shall either direct further processing of the complaint or pursuant to paragraph (c) or (d) of this section, issue a final decision, based on the record, including the Report of Investigation. The final decision shall be forwarded by the Secretary or designee to the Director who shall serve it upon all parties by certified mail.

(1) If the Secretary or designee determines that further processing of the complaint is necessary, the Secretary or designee will return the case to the Director, who will forward it with specific instructions to the Office of Hearings and Appeals and/or the investigator as appropriate.

(2) Except to the extent prohibited by law, regulation, or Executive Order, all parties will be provided copies of any information compiled as a result of actions taken under paragraph (b)(1) of this section.

(c) If the Secretary or designee determines that a violation of § 708.5 has occurred, the Secretary or designee shall issue a final decision and shall instruct the Director to take appropriate action